IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 15 of 1998 to O.J.APPEAL NO. 18 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MISHRIMAL ANANDKUMAR & ORS.

Versus

POLYCOT CABLES PVT.LTD.

Appearance:

1. O.J.APPEAL Nos. 15 of 1998 to 18 of 1998.

MR KS JHAVERI for Petitioners

MR RS SANJANWALA for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE

Date of decision: 20/07/2000

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

This group of appeals raise common questions and have been argued together. The appellants have challenged the order dated 18.2.1998 made by the learned Company Judge in Company Petition Nos. 306 to 309/97, by which all the Company Petitions were rejected. According to the appellants the respondent company had, despite statutory notices dated 10.7.1997 given by the appellants, not paid their dues and was therefore, liable to be wound up under Section 433, read with Section 434 of the Companies Act.

The appellants' case was that the respondent company was incorporated on 27th September, 1988 for the business of manufacturing of cables and other items. The appellants had advanced the disputed amounts to the company on which interest was to be paid. The company paid interest till 31st March, 1990. However, thereafter it did not pay interest, nor did it return the amounts which were outstanding as loan as per the balance-sheet of the company. The appellants therefore issued the statutory notice contemplated by Section 434(1)(a) of the said Act, requiring the company to pay the dues of the appellants. According to the appellants, the company failed and neglected to pay the dues and thereby become liable for being wound up because it was deemed to be unable to pay its debts.

2. In the affidavit-in-reply filed on behalf of the company, it was contended that in the year 1993, the Director of the company, except one had retired and two new Directors were inducted. Thereafter, in the year 1997, one more Director was inducted. According to the company, in or about 1992, when the company was under the management of the earlier Directors, there had arisen problems regarding discharging of dues of the Gujarat State Financial Corporation and the company had sought time for making payment of the dues, from the Corporation by its letter dated 27th May, 1992. The Corporation however, called upon the company to clear up all its dues by a show cause notice dated 20th July, 1992. Thereafter, by letter dated 27.1.1993, the Corporation again called upon the company to make the payments. A further notice was given on 14.6.1993 and finally, on 12.10.1993, the Corporation gave a notice under Section 29 of the State Financial Corporations' Act, 1951, requiring the company to pay the dues within seven days. According to the company, in view of these financial difficulties, the erstwhile management had decided to retire and hand over the management of the company to the present Directors and accordingly, a letter was addressed on 26.10.1993 to the Corporation, requesting them to approve the change in the management of the company.

When the management was so taken over in 1993, according to the company, it was mutually agreed between all concerned including the outgoing Directors that the new management would be liable only for the dues of the GSFC and the sales-tax dues while other credit balances shall be adjusted against the loss of the company. Such understanding was reflected in the writing executed by the managing Director and two other directors as per Annexure "F" to the affidavit-in-reply. It is the case of the respondent company that all the appellants were related persons and that is why the aforesaid arrangement was reached. It was also contended that the appellants had not produced any material in support of their averment that the amounts were given by way of loans to the company. It was further contended that more than three years had elapsed from the date on which the amounts allegedly became due and payable and therefore, the appellants' claim was time barred. According to the company, in the balance-sheet as on 31.3.1997, prepared on 5th Sept. 1997, a copy of which was annexed with the affidavit-in-reply, the company was a profit making company and it cannot be said to be a company unable to pay its dues.

3. In the rejoinder, the appellants took up a contention that the alleged document by which the arrangement for adjusting the dues was reached, was not signed by the outgoing Director Parasmal P. Bagrecha and that even if he had so signed, that was not binding on the appellants. Moreover, the amounts were shown by way of unsecured loan to the company in the balance-sheet as on 31st March, 1995, a copy of which was annexed at Annexure "D" to the affidavit-in-rejoinder. According to the appellants, there was no triable issue, nor any bonafide dispute in the matter and the company was liable to be wound-up.

4. In the sur-rejoinder, the company further elaborated its defence alleging that around April, 1997, after the dues of the GSFC were substantially cleared, the credit balances of the appellants were adjusted by closing their accounts and adjusting the amount against the losses of the company. Affidavits of two outgoing Directors were also filed in support of the stand taken up by the company, in which it was stated that at the time of the change in the management of the company, it was agreed and understood by all concerned including the outgoing Directors that the respondent company under the new management will be liable to clear only GSFC and sales-tax dues and in consideration of their undertaking to clear such dues, the company under the new management

will no longer be responsible for the dues of the erstwhile management.

5. In the background of the aforesaid controversy, the learned Company Judge took note of the fact that the amounts in question are said to be due, since way back in 1993, but nothing was done prior to the issuance of the notices on 10th July, 1997, and observed that the submission of the respondent as regards the above arrangement drew support from the delayed action on the part of the appellants. The learned Company Judge also took note of the fact that one of the appellants (petitioner of Company Petition No. 309 of 1997) had earlier filed a petition, which was dismissed for default in November, 1995 and no attempt was made thereafter to revive the same. In the background of the facts and circumstances of the case, the learned Judge held that there was no reason to infer that the company was unable to pay its debts. The petitions were therefore, rejected.

6. The learned Counsel appearing for the appellants placed a strong reliance on the balance-sheet of the company as on 31st March, 1995 at Annexure "D" to the affidavit-in-rejoinder. It was pointed out from the said balance-sheet that various amounts were shown as the amounts of unsecured loans of the four appellants. It was argued that once the amounts were so shown in the balance-sheet, there was no question of the dues of the appellant getting time barred because the entries in the balance-sheet acknowledged the liability in respect of the said amounts of unsecured loans. It was submitted that since the dues were shown to be outstanding in the said balance-sheet of the company, there was a heavy burden on the company to prove as to on what basis the amounts were adjusted against the losses of the company. It was contended that the appellants had never agreed to adjustment of their amounts towards the losses of the company, nor could have the outgoing director, who had not even signed the alleged agreement, agreed to any such arrangement without the concurrence of the appellants. The learned Counsel submitted that the dues of third parties cannot be got so adjusted by the outgoing directors and the arrangement was not at all binding on the appellants and could never be relied upon by the company. It was submitted that since the dues of the appellants cannot be so legally adjusted towards losses of the company, the affidavits of the two outgoing directors in support of this stand taken up by the company were of no consequence.

7. There can be no dispute about the proposition that the dues of third parties cannot be got adjusted without their concurrence towards the losses of the company. The company was directly answerable to the creditors from whom loans were taken and therefore, even if some outgoing director had agreed to adjustment of the dues of the creditors towards the losses of the company, such an arrangement did not bind the appellants. From the impugned order of the learned Company Judge, it appears that the learned Company Judge attached weight to the contention of the company that an arrangement was arrived at by which it was decided, while allowing the erstwhile directors to walk out, that nothing would be payable to the appellants. The inaction of the appellants for recovery of the dues was interpreted to support the arrangement version of the company. Since the dues of the appellants could never have been adjusted towards the losses of the company without their concurrence to such arrangement, the premises on which the learned Company Judge proceeded, was, with respect, not correct. There are various aspects borne out from the pleadings on record and since the learned Company Judge has decided to reject the matter on the aforesaid ground, we would rather remand the matter for reconsideration in light of the material placed on record by both the sides, so that the learned Company Judge can take a fresh decision in the matter after hearing the parties. The impugned order is therefore, set aside in all these appeals and the matters are remitted to the learned Company Judge for a fresh consideration of the matter. The appeals are accordingly allowed with no order as to costs.

---

*/Mohandas